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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 1093

TENNESSEE GAS TRANSMISSION COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in the above-entitled case centered on December 30, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Respondent, Federal Power Commission (R. 2152), is reported at 30 F.P.C. 1477. The opinion of the Circuit Court of Appeals, printed in the Appendix hereto, *infra,* p. 1a is reported in 340 F 2d 100. The companion decision rendered the same

day in *Pan American Petroleum Corp.* v. *Federal Power Commission,* is also printed in the Appendix hereto, *infra,* p. 8a, and is reported in 339 F. 2d 694.[1]

JURISDICTION

A petition for rehearing *en banc* was denied by the Court of Appeals on February 11, 1965. By order of the Court of Appeals dated February 19, 1965, its mandate was stayed to April 22, 1965 or until final disposition of proceedings in this Honorable Court.

The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act [15 U.S.C. §717r(b)] and Chapter 81 of the Judicial Code, 28 U.S.C. §1254.

QUESTION PRESENTED

Whether the Respondent Federal Power Commission can construe a certificate of public convenience and necessity, upon the basis of criteria announced after the issuance of such certificate, as not authorizing the construction and operation of facilities undertaken by Petitioner in reliance upon such certificate.

STATUTE INVOLVED

The statutory provisions involved are Sections 7(c) and (e) of the Natural Gas Act, 15 U.S.C. §717f(c) and (e). They are printed in the Appendix hereto, *infra,* pp. 13a-14a.

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[1] The record in the Court below has been certified to this Court in Nos. 1024 and 1025 in which petitions for certiorari have been filed to review the decision in *Pan American Petroleum Corp.* v. *Federal Power Commission,* 339 F. 2d 694 (10th Cir., 1964). Reference is made in this petition to such record.

STATEMENT OF THE CASE

These proceedings involve the question of whether service undertaken by Petitioner pursuant to what it in good faith considered to be a valid certificate of public convenience and necessity issued pursuant to Sections 7(c) and (e) of the Natural Gas Act [15 U.S.C. §717f(c) and (e)] was in fact authorized by the certificate. The certificate in question is of a type that has come to be known as a "budget-type" authorization. This type of certificate does not specify the exact facilities authorized, but instead constitutes a blanket authorization for construction of facilities to attach new gas supplies during a calendar year. The only qualification in the authorization concerns the cost of the facilities.

The genesis of the "budget-type" certificate is in the commendable efforts of the Respondent to expedite the issuance of certificates for the construction and operation of facilities in the face of a statute which requires notice and hearing in all instances. To this end the Respondent in 1956 issued its Order No. 185, 15 F.P.C. 793, wherein the problem was considered. This order rejected, as beyond the Respondent's power under the Act, a suggestion that the term "facilities" in the Natural Gas Act be redefined by the Respondent "to exclude minor installations or changes in connection with the rendition of service to existing customers or markets."[2] It noted, however, that it had requested such authority from Congress, and that

> "In the meantime and as a substitute, the Commission advises any interested natural-gas com-

[2] Respondent did not explain why it could not define "facilities" in the particular instance, although it had already done so under other circumstances. See 18 C.F.R. § 2.55.

pany subject to the Natural Gas Act that it may file under section 157.6 of the Rules a single certificate application covering in general outline along the lines of a budget estimate the proposed routine construction intended to be undertaken by it during the current or ensuing fiscal year, listing the facilities proposed, the estimated cost of each item, the capacity, purpose, and time of intended construction, customers affected by each facility proposed, effect of proposals upon gas supply and deliverability, rates, service, and other pertinent information. A hearing could then be held on such a proposal and a certificate issued in accordance with the general application. At the end of the period, a statement shall be filed showing the actions taken under the certificate and any authority thereunder which was not exercised" (15 F.P.C. at 792, 794).

Although it would appear from the above advisory statement that the Respondent contemplated a single application giving details of several individual projects, in practice the Commission did not require that the applications set forth specific details of the individual projects. Instead, all budget-type certificates were issued to companies on the basis of generalized presentations. For example, prior to its application which is the subject of these proceedings, Petitioner had twice been issued certificates which did not detail the individual projects authorized. *Tennessee Gas Transmission Company,* 22 F.P.C. 195 (1959) and 23 F.P.C. 297 (1960).

Petitioner's application that is the subject herein was filed with Respondent on October 4, 1960 and docketed as Docket No. CP61-106 (R. 1717). After outlining Petitioner's policy of continuously acquiring additional natural gas reserves either by purchase from

producers or by development of wholly owned reserves, the application stated that the facilities Petitioner intended to construct were necessary to enable Petitioner "to receive deliveries of natural gas into its pipeline system during the calendar year 1961." There was no specification of whether these deliveries into Petitioner's pipeline system were to be from gas purchased on a unit basis, or from gas produced from reserves that Petitioner had developed on gas leases it had acquired.

A combined notice of Petitioner's application and of a date of hearing thereon was issued by Respondent on November 29, 1960 (R. 1724). There being no interventions, the matter was heard under Respondent's procedure for uncontested proceedings and a certificate was issued on January 6, 1961 (R. 1728).

The order authorized the construction and operation of facilities "as more fully described in the application" (R. 1730). The facilities so authorized were limited in the aggregate to $5,000,000 with no single project to exceed a cost of $500,000. The order also required that Petitioner on or before March 1, 1962, submit to Respondent a statement under oath setting forth the details of each project. In addition the order provides that "The purpose of this 'budget-type' application is to augment Applicant's ability to act with reasonable dispatch in contracting for and connecting to its existing pipeline system new supplies of natural gas in various producing areas generally coextensive with said system" (R. 1728). Again there was no specification of the source of the gas or limitation that would preclude the delivery from Petitioner's own reserves.

Pursuant to such authorization, Petitioner constructed among other projects 2.63 miles of 12¾ inch gathering line at a cost of approximately $288,000 in order to connect to its pipeline system natural gas to be produced from leasehold interests purchased by Petitioner from Pan American Petroleum Company ("Pan American") in the Bastian Bay Field, Plaquemines Parish, Louisiana (R. 1174, 1175). This small gathering line was placed in operation on February 3, 1961 (R. 2152).

By letter of February 23, 1961, the Secretary of Respondent stated that Respondent had noticed from news accounts that Petitioner had acquired the Bastian Bay leases from Pan American and that gas produced from such leases was being transported through Petitioner's transmission system. The letter requested that Petitioner submit information with respect to the docket number of the authorization pursuant to which such operations were being conducted (R. 17). Petitioner responded informing Respondent that deliveries of natural gas from the Bastian Bay leases were currently being made into Petitioner's transmission system via the 2.63 miles of 12¾ inch gathering line. Respondent was further advised that said gathering line was constructed pursuant to the aforesaid certificate issued in Docket No. CP61-106.

Respondent, by order issued April 6, 1961, reopened the proceedings in Docket No. CP61-106 reciting that it had been informed that Petitioner had purchased oil and gas leases owned by Pan American in the Bastian Bay Field and that Petitioner had connected such leases to its transmission system pursuant to authori-

tion granted in Docket No. CP61-106 (R. 1732). Respondent stated that it had no information regarding the facilities constructed by Petitioner to the Bastian Bay Field and that there was "ground for reasonable doubt as to whether said construction actually comes within the authorization granted in Docket No. CP61-106" (R. 1732).

Petitioner filed an application for rehearing of this order, which was subsequently denied on June 29, 1961. Prior to such denial Respondent, by order issued May 17, 1961 (R. 1803), set the reopened Docket No. CP61-106 for hearing on July 5, 1961 and ordered Petitioner to go forward on that date with the presentation of evidence on the issues posed by the ordering paragraph "A" of the order of April 6, 1961, which provided as follows (R. 1733):

> "(A) The proceedings designated as Docket No. CP61-106 are hereby reopened for the purpose of determining:
>
> "(1) Whether the authorization issued on January 6, 1961, to Tennessee Gas Transmission Company covered the construction and operation of the facilities necessary to connect the the Bastian Bay Field reserves to Tennessee's system, and
>
> "(2) The cost of making natural gas from such reserves available to the Tennessee system."

Hearings were held and evidence was presented by Petitioner, most of which was presented by Petitioner at the direction of the Examiner and over Petitioner's protest. No evidence was submitted by Respondent or

any party to the proceedings [3] with the minor exception of some State Commission orders and items by reference introduced through counsel. Petitioner has consistently taken the position that Respondent's reopening of the proceeding was unlawful and that the procedures thereafter followed shifted the burden of proof to Petitioner and were in violation of the Natural Gas Act (R. 23).

On August 25, 1961, Respondent ordered Pan American, which company was not a party to Docket No. CP61-106, to submit information concerning its acquisition of, and investment in, the Bastian Bay leases which it had conveyed to Petitioner (R. 1858). Thereafter on March 12, 1962, Respondent issued in Docket No. CI62-1034 an order directing Pan American to show cause why it should not be found to be engaged in the sale of natural gas to Petitioner from the Bastian Bay Field subject to the jurisdiction of Respondent without requisite authorization (R. 1913). The order further consolidated said proceeding with that involving Petitioner at Docket No. CP61-106. Further hearings were then held on May 7 and 8, 1962 and were concluded on June 26, 1962 with the presentation of Pan American's evidence. Thereafter, the Presiding Examiner issued an Initial Decision on April 1, 1963 in which he reached conclusions similar to those eventually set forth by Respondent in Opinion No. 413 and

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[3] By order of May 12, 1961 (R. 1802A) the following were permitted to intervene: Long Island Lighting Co., City of Pittsburgh, Pa., The Brooklyn Union Gas Co., The East Ohio Gas Co., Hope Natural Gas Co., Lake Shore Pipe Line Co., New York State Natural Gas Corp., The Peoples Natural Gas Co., The United Gas Improvement Co., Consolidated Edison Co., Fuels Research Council, Inc., National Coal Ass'n and United Mine Workers of America.

the accompanying order herein complained of (R. 1967). Exceptions to the Presiding Examiner's Initial Decision were duly filed by Petitioner and Pan American (R. 2095, 2027). Petitioner and Pan American requested oral argument, which was held before Respondent on September 24, 1963, and on December 12, 1963, Respondent issued its Opinion No. 413 and accompanying order.

In its Opinion No. 413 and accompanying order Respondent determined that the 2.63 miles of gathering line built by Petitioner to connect to its transmission system natural gas produced from the Bastian Bay Leases, "is a jurisdictional facility constructed without authorization of this Commission" and further determined that the sale by Pan American of leases in the Bastian Bay Field constituted "a sale of natural gas in interstate commerce for resale, similarly without authorization of this Commission as required by the Act" (R. 2159). The basis for declaring that Petitioner's 2.63 mile gathering line was not authorized was that (1) it was not routine construction because of the size and cost of the reserve attached and (2) the certificate as issued did not authorize the attachment of reserves owned by Petitioner.

Respondent thereupon required that within six months of the date of the December 12, 1963 opinion and order both Petitioner and Pan American make such filings and take such steps necessary to bring them into compliance with the Natural Gas Act.

Rehearing was denied by Respondent by order issued February 4, 1964, one of the orders herein complained of, but Respondent did, however, stay the effectiveness of its decision of December 12, 1963 until six months after issuance of final mandate of the courts (R. 2223).

Appeal was taken by Pan American to the Court of Appeals for the Tenth Circuit in No. 7659 and Petitioner's appeal to the Fifth Circuit was removed to the Tenth Circuit and heard as No. 7751. Respondent's determination that the transfer of leases by Pan American was subject to its jurisdiction was reversed by the Tenth Circuit based on this Honorable Court's holding in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company,* 337 U.S. 498 (1949). Respondent's determination that Petitioner's construction and operation of the 2.63 mile gathering line had not been authorized was affirmed.

In affirming Respondent's Opinion No. 413 with respect to the construction undertaken by Petitioner, the Tenth Circuit held that it was the duty and intent of the Respondent to examine all facets of a dedication of natural gas to interstate commerce. Also the Court held that it was the Commission's intent to authorize construction which was routine and minor in nature and the impact of the attachment of the Bastian Bay Field removed it from this category notwithstanding the minor extent of the facilities involved. As previously noted, the Tenth Circuit denied rehearing of its determination with respect to Petitioner on February 11, 1965, but on February 19, 1965 stayed its mandate until the disposition of these proceedings.

REASONS FOR GRANTING THE WRIT

1. These proceedings involve an important question with respect to the administration of the Natural Gas Act and indeed any regulatory statute providing for licensing. Basically, the question is the latitude allowed a regulatory agency in subsequently concluding

that a generalized authorization it has previously granted covering a group of non-specified projects does not cover a particular project which particular project was constructed in accordance with the prescribed conditions in the authorization.

It is perfectly apparent that the Respondent's contention that Petitioner required further certificate authorization with respect to the Bastian Bay line was based upon the assumption that the Respondent had jurisdiction over the lease-sale transaction. It is submitted that such contention was dictated solely by Respondent's desire to fortify such assumption. In order for the Respondent to assert jurisdiction over the lease-sale transaction it also had to take the position that Petitioner needed additional certificate authorization to construct the line in order to connect the reserves. Had Respondent not attempted to expand its jurisdiction to include the lease-sale, no question would ever have been raised about the construction of the Bastian Bay line by Petitioner. But the lower Court's decision which Respondent herein seeks to have reviewed in *Federal Power Commission* v. *Pan American Petroleum Corp.*, also sought to be reviewed in *Pennsylvania Utility Commission* v. *Pan American Petroleum Corp.*, Nos. 1024 and 1025, this term, has laid bare Respondent's basic error in this jurisdictional conclusion and has made clear that Respondent's assumption of jurisdiction over the lease transaction was beyond its power under the Natural Gas Act. Once the construction of the small gathering line built by Petitioner under the authority of its certificate issued by Respondent is considered separately and apart from the non-jurisdictional lease transaction, as it must be, it can only be concluded that the construction of such line was

of the precise type contemplated by the budget-type certificate.

The question here involved goes to the validity of *all* of the many[4] "budget-type" certificate authorizations, and possibly others, that have been issued by Respondent. If the Respondent chooses to review the facilities constructed and the operations carried on and decides, on the basis of events or circumstances that were not present or contemplated at the time the authorization was issued that the projects have not in fact been authorized then all budget-type certificates are suspect. Furthermore, there is involved the collateral issue of the point in time at which the actual completed construction is to be judged with the Respondent's policy on what is permissible construction under a budget-type authorization. Thus the Court below, erroneously in our view, sought to support a contention that the Respondent did not intend to include in budget-type authorizations facilities for the attachment of a company's own reserves by reference to Respondent's rules promulgated over eighteen months *after* the issuance of the certificate herein.[5]

2. It is Petitioner's view, which it seeks to argue to this Honorable Court, that it is incumbent on Respondent to definitely fix by regulation the standards governing the issuance of such certificates. We have already outlined our argument showing that there was not the slightest suggestion that authorizations did not

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[4] Since the inception of the budget-type certificate in 1956 virtually every major pipe line regulated by the Commission obtains such an authorization each year.

[5] Although not stated in the decision below, the quotation in footnote 1 thereof, *infra* pp. 3a-4a, is from Order No. 247, issued June 7, 1962, 27 F.P.C. 1119.

cover the attachment of company-owned reserves. On the contrary, Petitioner had, with Respondent's knowledge, used a budget-type certificate for this precise purpose.

Respondent in an evident attempt to overwhelm by sheer weight of numbers stressed the fact that reserves attached in the certificate under review totaled 750 million Mcf and cost $159,463,500. The size of reserves to be attached by a budget-type facility had never been mentioned or referred to in any manner in any application or authorization prior to this time.

Outside of the fact that the specific construction authorized by the certificate was only for 2.63 miles of line costing some $288,000 and was admittedly not substantial, the effect of the construction should be compared with the size of Petitioner's operation and Respondent's prior authorizations. Thus the 750 million Mcf and $159,463,500 should be first compared with the fact that two other projects which Respondent does not dispute were built in compliance with the very same "budget-type" authorization involved the attachment of reserves totalling respectively 345 million Mcf and 213 million Mcf, (R. 1411), and at the initial prices approved by settlement agreement in each instance [6] the total cost of gas for the respective projects would approximate $67,275,000 and $45,795,000. Moreover, 750 million Mcf which Respondent found to be the Bastian Bay reserves is considerably less than a single year's gas requirements of Petitioner, and during the calendar year 1963, the deliveries from Bastian

[6] *Union Texas Petroleum, et al.*, 29 F.P.C. 730, 731 (1963); *Shell Oil Company*, 28 F.P.C. 257, 264 (1962). With escalation provisions that remain in the contracts, the total cost of gas over the life of these contracts could well exceed these totals.

Bay represented only 1.9 percent of total deliveries into Petitioner's pipeline system.[7]

Finally, it should be noted that Petitioner's sales rates are lower at the present time than as approved by Respondent in 1962, so there has been no adverse impact on Petitioner's customers resulting from the attachment of the Bastian Bay reserves.

The above wholly refutes the holding of the Court below that "The acquisition and utilization of the Bastian Bay resources were neither routine nor minor in their impact and the very magnitude of the event was properly considered by the Commission as a factor negativing the authority claimed under the 'budget-type' certificate." Instead of this subjective impression of what is substantial, proper administration of the Natural Gas Act requires fixed standards advising all those seeking a "budget-type" authorization of the limits of what may be applied for and authorized.

3. Absent fixed and definite standards announced *prior* to authorization, Respondent's "hind-sight" determination that no certificate was issued is simply and obviously an attempt to avoid the clear holding of this Honorable Court in *United States* v. *Seatrain Lines,* 329 U.S. 424 (1947),[8] that an agency may not revoke a license without specific statutory authority to do so. The Natural Gas Act provides no such authority, but the Commission herein would expand broadly its powers under the Act by the device of reopening the proceedings and holding that on the basis of its "afterthoughts" a certificate had not in fact issued.

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[7] Source: 1963 FPC Form 2 of Petitioner.

[8] See also: *C.A.B.* v. *Delta Air Lines, Inc.,* 367 U.S. 316 (1961).

4. The grant of this petition and reversal of the Court below would in no way preclude full review of the arrangement under which Petitioner acquired reserves in the Bastian Bay Field. The companion determination of the Court below holding that the Commission has no jurisdiction over Pan American's sale of leases to Petitioner is the subject of petitions for certiorari filed by Respondent and the Public Service Commission of the State of Pennsylvania (Nos. 1024 and 1025, this Term). If these petitions are granted and the Court below is reversed in that determination, Pan American would presumably file a certificate application for authorization to carry out its contract for sale of the leases. At that time the Commission could consider the propriety of the lease transfer.

On the other hand, if the Court below is affirmed respecting the lease transfer, it is obvious that Respondent's regulation of Petitioner would still extend to the latter's wholesale rates as well as its construction program. In this regard the Court of Appeals for the District of Columbia Circuit, in a case similar to the case-at-bar in which a natural gas pipeline company had acquired reserves via a non-jurisdictional lease sale, stated as follows:

> "It was entirely within the Commission's power to certify the pipeline construction program without passing upon the financial merits of the gas acquisition arrangement * * *." *Public Service Commission of New York* v. *F.P.C.*, 287 F. 2d 143, 145 (D.C. Cir. 1960).

There, however, the Commission's issuance of a certificate was reversed because, notwithstanding the fact that it need not have decided the issue in certificate cases, it had purported to pass upon the financial

merits of the acquisition although without substantial evidence to support its conclusions. It is not contended here that the Commission passed upon the financial merits of the lease acquisition arrangement, and Petitioner is confident that in a rate case it could readily support its purchase of the Bastian Bay reserves.*

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

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* In strenuously supporting its lease acquisition costs in a future rate case Petitioner would show that it entered into the Bastian Bay transaction for the purpose of enabling it to maintain and expand its service. Moreover, Petitioner has not sought to increase any of its wholesale rates appproved by Respondent in 1962, thus indicating no adverse impact from the purchase of the reserves.